

WTO Dispute Settlement: The Implementation Stage

Peter-Tobias Stoll and Arthur Steinmann

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I. Introduction

The very basis of the world trade order is the governance of the rule of law in international trade relations. The dispute settlement prominently contributes to its maintenance and enforcement. Having already enjoyed a fairly good reputation under GATT,¹ the Uruguay-Round gave way to a formidable reinforcement of the institutional and legal structures of the world trade order and its dispute settlement system.² So far, WTO dispute settlement under the DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) met all expectations. An impressive number of matters have been put on the agenda of the Dispute Settlement Body (DSB) and were duly dealt with by panels and the Appellate Body.³ Among those were a few but important and pertinent matters, which could not be resolved by GATT dispute settlement. In contrast to GATT dispute settlement and due to the reversed consensus rule and a strict time frame, panel and appellate body reports

¹ See e.g. R.E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2nd edition, 1990; id., *Enforcing International Trade Law – The Evolution of the Modern GATT System*, 1993; R. Rode (ed.), *GATT and Conflict Management*, 1990; W.F. Davey, “Dispute Settlement in GATT”, *Fordham Int’l L.J.* 11 (1987), 51 et seq.

² See e.g. J.H. Jackson, *The World Trading System*, 2nd edition, 1997; N. Komuro, “The WTO Dispute Settlement Mechanism”, *JWT* 32 (1995), 5 et seq.; E.U. Petersmann, *The GATT/WTO Dispute Settlement System*, 1997; id., “The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948”, *CML Rev.* 31 (1994), 1157 et seq.; id., “Proposals for Strengthening the UN Dispute Settlement System – Lessons from International Economic Law”, in this Volume p. 105 et seq.; T.J. Schoenbaum, “WTO Dispute Settlement: Praise and Suggestions for Reform”, *JCLQ* 47 (1998), 647 et seq.

³ As of 1 February, 1999 as many as 123 distinct matters have been dealt with by the WTO, see the “*Overview of the State-of-play of WTO-Disputes*”, downloaded from the WTO-Website at www.wto.org.

were issued in time and adopted. This has been the case with the disputes on the EC banana regime,⁴ the EU hormone beef import regime⁵, and also with the Japanese taxes on alcoholic beverages.⁶

As this new dispute system came into existence only recently, the work of panels and the Appellate Body and thus the first stages of the dispute settlement procedure have attracted much attention. Some disputes meanwhile have passed those procedures. In particular the recent controversy about the EC's due compliance with the recommendations and rulings in the Banana case have thrown light on the subsequent stages of the dispute settlement procedure, which relates to implementation and potential trade sanctions.

The DSU provisions on this part of the procedure contain new features. Neither the old GATT rules nor the new WTO rules, however, so far have received much attention. As now becomes apparent, while the reversed consensus rule and the shortened time frame widely exclude political interference from panel proceedings and appellate review, the overall effectiveness of the dispute settlement system will only be secured if adopted panel or appellate body reports are duly implemented.

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- ⁴ WTO: EC-Regime for the Importation, Sale and Distribution of Bananas, Panel Reports: WT/DS27/R/ECU, /GTM, /HND, /MEX, /USA (22 May 1997); Appellate Body Report: WT/DS27/AB/R (9 September 1997); GATT47: EEC-Member States' Import Regimes for Bananas, DS32/R, circulated 3 June 1993; EEC-Import Regime for Bananas, DS38/R, circulated 11 February 1994.
- ⁵ WTO: EC-Measures Concerning Meat and Meat Products (Hormones), Panel Reports: WT/DS26/R, WT/DS48/R (18 August 1997); Appellate Body Reports: WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998); GATT 47: US-EC: Animal Hormones Directive, blocked by US in TBT/M/Spec/8 (16 September 1987); EC-US: Increase in Rates of Duty on Certain Products from the EC, blocked by US in SR.45/2 (4 December 1989).
- ⁶ WTO: Japan-Taxes on Alcoholic Beverages, Panel Reports: WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996); Appellate Body Reports: WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996); GATT 47: EEC-Japan: Restrictions on Alcoholic Beverages, Panel Report adopted on 10 November 1987, GATT Doc., BISD 34S/83, 1988. The EC has raised concerns that the new regime continued to violate provisions of GATT and of the WTO since 1989, see e.g. C/M/228 (8 February 1989). The dispute over proper implementation is now finally being solved under the WTO rules on Dispute Settlement.

II. Implementation and Time to Implement

Following the general obligation of a Member state to implement WTO rules according to article XVI: 4 of the WTO agreement, the implementation of panel or appellate body reports or recommendations as adopted by the DSB is governed by article 21 DSU. This provision functions as the “meat to the bone” to the substantive rule-oriented dispute settlement procedure. In order to ensure actual performance of the rulings and recommendations of the panel or appellate body, arts 21 et seq. prescribe a detailed mechanism of implementation under the surveillance of the DSB.

1. “Prompt Compliance” — the Forgotten Rule?

Following the adoption of recommendations and rulings of the panel or appellate body by the DSB, the member concerned is granted a 30 day period to inform the DSB of its intentions in respect to implementation (article 21 para.3). As has been stated by other authors⁷, implementation in general under the WTO has been superb, as all defendants in WTO disputes have announced their intentions to implement or have taken measures in order to implement the DSB’s findings. Implementation is to be “prompt” (article 21 para.1) or “immediate(ly)” (article 21 para.3) while paying special attention to developing countries (article 21 para.2), especially as the first objective of the DSU is to secure withdrawal of the infringing measures (article 3 para.7). However, the DSU also grants an exception to this general rule. According to article 21 para.3, if immediate compliance is impracticable, a member may be granted a “reasonable period of time” to comply.

Three different procedures are envisaged to define such a time period: it may be approved by the DSB (article 21 para.3 lit.(a)) or mutually agreed upon by parties to the dispute within 45 days after adoption of the report (article 21 para.3 lit.(b)), or determined by binding arbitration⁸ within 90 days of the adoption of the panel or appellate body report (article 21 para.3 lit.(c)). The total time span between the adop-

⁷ See e.g. Schoenbaum, see note 2.

⁸ According to note 12 and 13 DSU of article 21 para.3 lit.(c) an arbitrator is appointed by the Director-General in case an agreement cannot be reached between the parties, whereby the arbitrator can be either an individual or a group.

tion of the panel or appellate body report and the determination of the "reasonable period of time" shall not exceed 15 months (article 21 para.4).

At first sight, the DSU seems to allow for a longer implementation time only if special circumstances are at hand that make prompt compliance "impractical". In fact, though, immediate compliance has only occurred in two unusual cases in which the effect of the infringing had immediately ceased due to the measure's automatic expiry at the time of the panel decision.⁹ In all other cases a need for a "reasonable" implementation time was accepted and granted either by the parties to the dispute¹⁰ or by the arbitrator.¹¹ Thus, the exception inherent in article 21 para.3 has turned into the rule. The reasons for this change from exception to rule becomes apparent when taking into account the practical implications of a ruling or recommendation by the DSB against a member. When observing panel recommendations or rulings members concerned will often face an array of political, economic, social, or even internal legal problems. It is understandable therefore that members confronted with this burden will wish to extend the time span of implementation, especially if compliance calls for far-reaching changes.

⁹ US-Restrictions on Imports of Cotton and Man-Made Fibre Underwear, WT/DS24; US-Measures Affecting Imports of Woven Wool Shirts and Blouses, WT/DS33.

¹⁰ Canada-Certain Measures Concerning Periodicals, WT/DS31, mutual agreement announced to the DSB, WT/DSB/M/37 (4 November 1997); EC-Measures Affecting Importation of Certain Poultry Products, WT/DS69/9 (23 October 1998); India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50, mutual agreement submitted to the DSB on 22 April 1998, WT/DSB/M/45 (10 July 1998); Argentina-Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/14 (7 July 1998).

¹¹ Japan-Taxes on Alcoholic Beverages, WT/DS8/15, WT/DS10/15, WT/DS11/13 (14 February 1997); EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/15 (7 January 1998); EC-Measures Concerning Meat and Meat Products (Hormones), WT/DS26/15, WT/DS48/13 (29 May 1998); Indonesia-Certain Measures Affecting the Automobile Industry, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (7 December 1998); Australia-Measures affecting Importation of Salmon, WT/DS18/9 (23 February 1999).

2. Approval and Mutual Agreement — Article 21 para.3 lit. (a) and (b) DSU

As stated, article 21 para.3 leaves the member concerned three procedures to seek a reasonable period of time for implementation. Of these, the determination by the DSB pursuant to article 21 para.3 lit.(a) has not yet been used, which in view of the positive consensus needed, is not surprising. If the parties to the dispute can agree on a reasonable time period they will make use of article 21 para.3 lit.(b). In fact, such agreements have been reached in a number of disputes, with “reasonable” time periods ranging from 8 to 15 months¹². However, one must take into consideration how the mutual agreements between parties to the dispute are reached: Members in settlement agreements will try to find a consensus between the opposite starting points – the victorious party clearly seeking speedy implementation, the member concerned bargaining for a longer period of time. These starting points will not be determined by the good- or ill will of the parties, but will be modeled on the decisions the parties could obtain in a dispute before an arbitrator according to article 21 para.3 lit.(c). It is in consequence not the mutual agreement, but the arbitrators who develop the definitions needed for an effective application of the DSU and in turn influence the members when agreeing to implementation periods.

3. The Arbitral Decisions — Article 21 para.3 lit. (c) DSU

So far, five proceedings under article 21 para.3 lit.(c) have been concluded.¹³ In all of the five proceedings a reasonable time period was granted, ranging from 15 months in the first three, 12 months in the fourth and 8 months in the last proceeding.

¹² Canada-Certain Measures concerning Periodicals, WT/DS31: 15 months; India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50: 15 months; EC-Measures Affecting Importation of Certain Poultry Products, WT/DS69/9: 8 ½ months; Argentina-Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/14: 8 months; see all of them note 10.

¹³ Japan-Taxes on Alcoholic Beverages; EC-Regime for the Importation, Sale and Distribution of Bananas; EC-Measures Affecting Meat and Meat Products (Hormones); Indonesia-Certain Measures Affecting the Automobile Industry; Australia-Measures Affecting Importation of Salmon; see all of them note 11.

During these arbitral proceedings two main problems have dominated: the general understanding of the 15-month “guideline” inherent in article 21 para.3 lit.(c) and the determination of the nature of the relevant circumstances which constitute “impracticability”.

However, before starting to analyze the arguments and the findings of the different proceedings, it is important to note that the first arbitrators, in particular, in their findings mingled the two questions inherent in article 21 para.3 – the questions of the *if*, namely the question of impracticability in general, and the *how long*, logically following the first question. The proceedings have, so far, mixed these questions in favour of a “gliding scale”, in effect concluding that once a member demanded a reasonable time for implementation, such a period should be granted, putting emphasis on the duration of the time period rather than dealing specifically with the question of whether such a period should be granted at all. It is in this context that the question of the interpretation of the 15-month guideline inherent in article 21 para.3 lit.(c) was discussed by the arbitrators.

a. 15 Months – a “Guideline”?

Article 21 para.3 lit.(c) states that as a “guideline” to the arbitrator, the “reasonable period of time” should not exceed 15 months, save for “particular circumstances” of the case. However, article 21 para.3 lit.(c) gives no indication as to the legal weight of this guideline. In the five arbitration proceedings different positions have been voiced and an interpretation of the status of the guideline has evolved.

The awards in the early Japan-Taxes case and the EC Bananas case concluded that a 15-month period was to be granted, in view of the lack of persuasive evidence to the contrary presented by either of the parties, seemingly seeking an easy way out of the dilemma of the difficult task of making new law in the first arbitration proceedings.¹⁴ In essence, the reading of article 21 para.3 lit.(c) by the first arbitrators was that “as a guideline, a reasonable period of 15 months *shall* be granted”, a reading that is only partly covered by the wording of this article.

The following proceedings have interpreted the guideline differently. The arbitrator in the EC Hormones case accepted “prompt” implementation as the general rule and concluded that “the reasonable period of time, as determined by Article 21.3(c), should be the shortest period

¹⁴ WT/DS27/15, para.19; WT/DS8/15, WT/DS10/15, WT/DS/11/13, para.27.

possible".¹⁵ The wording of article 21 para.3 lit.(c) was not seen as a rule, but as an "outer limit or a maximum in the usual case". Nevertheless, the arbitrator concluded that it was to the parties to demonstrate "particular circumstances" and found that an implementation time of 15 months was reasonable, being sympathetic to the complex legislation procedure in the EC.¹⁶ Despite reading the guideline only as an "outer limit", thus seeking the shortest possible time period for implementation, in consequence the arbitrator decided the case on the basis of the "guideline", following the arbitrators in the Japan-Taxes and EC Bananas arbitration. The basic interpretation of the 15-month guideline was cited in the following arbitration proceedings and greatly influenced their outcome. In the Indonesia-Automobiles case, after referring to the Hormones-arbitration, the arbitrator concluded that the decisive factors must be those concerning the actual "impracticability", completely discarding the "guideline" of article 21 para.3 lit.(c).¹⁷ Equally, in the recent Australia-Salmon arbitration the arbitrator cited the findings of the EC-Hormones arbitration and concluded that the reasonable implementation time should be significantly less than 15 months due to nature of the measure to be implemented by Australia.¹⁸

Clearly, in the latter two arbitration procedures "impracticability" was the decisive element. It is interesting to see that the "rule" of a 15-month time period purported by the first arbitrators was substituted for the predominance of the question of "impracticability" – it is now the nature of the implementation measure that will influence the duration of the implementation time, the 15-month period being a "guideline" not to be exceeded save for "particular circumstances", the emphasis nevertheless lying on prompt or speedy implementation as demanded throughout the DSU.¹⁹ Therefore, it is important to determine the factors that constitute impracticability, as they will, in turn, lead to a longer or shorter implementation time.

¹⁵ WT/DS26/15, WT/DS48/13, see note 11, para.26.

¹⁶ *Ibid.*, paras 25 and 27.

¹⁷ WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, see all of them note 11, para.22.

¹⁸ WT/DS18/9, see note 11.

¹⁹ Arts 3 para.7, 21 paras 1 and 3.

b. Impracticability: Legal Barriers or Structural Adjustment?

Concerning the issue of the nature of the circumstances causing impracticability, two interpretations have clashed: a policy-oriented interpretation, brought forward by members seeking a longer time of implementation, against the US-American position, which proposes a limited legal and technical understanding of these circumstances.²⁰

(1) *The Arguments*

In the first arbitration award Japan argued before the arbitrator that immediate compliance was “ordinarily almost impossible” and stated that it required up to five years to implement the recommended increase in taxes. The Japanese government based its arguments on two main grounds: first, on its difficulty in adopting the needed formal legislation, especially in view of the government’s parliamentary minority and the strict time-frame for budgetary legislation in Japan’s diet; and secondly on the adverse effect of the proposed legislation on the liquor producing industry, which was to bring about a tax rise on “Shochu B” to 2.4 times the original rate.²¹

Similarly, the EC in the Bananas case, in addition to citing its complex internal legislative mechanism (in this case additionally calling for consultations with *Lomé*-Convention states), claimed the need for a 15-month reasonable time period due to its administrative practice of implementing new legislation only twice each year, as well as the advance notice necessary to “permit those involved with the banana supply chain to make the necessary adjustments to their planning and logistics”.²²

Thus, two approaches have to be distinguished. On the one hand, practical difficulties of implementation in form of internal time-spans or a complex procedure might cause a “physical” impossibility of enacting the necessary legislation immediately. The alleged “adverse effects” of the extreme tax raise, “unprecedented in the history of any developed country”²³ or adjustments in planning and logistics are only

²⁰ The US has acted as the member seeking speedy implementation in four out of five arbitration proceedings.

²¹ WT/DS8/15, WT/DS10/15, WT/DS11/13, see all of them note 11, paras 8 and 18-25.

²² WT/DS27/15, see note 11, paras 9 and 10.

²³ WT/DS8/15, WT/DS10/15, WT/DS11/13, see all of them note 11, para.19.

secondary concerns that are not directly linked to an impossibility of immediate implementation, but rather take political, social and economic consequences (i.e. policy) into consideration.

A perfect example for "policy-oriented" argumentation was put forward in the Indonesia-Automobiles arbitration. Indonesia acknowledged that it was legally able to enact the necessary legislation in only six months following the adoption of the appellate body decision (and only one month after the arbitral decision). However, it claimed the need for an additional time frame of nine months due to "structural adjustments" necessary to weaken the effects on the country's industry in light of its "social and economic difficulties".²⁴

Opposing this approach, the US has taken a different view to the problem of determining impracticability. It has pleaded to limit the application to the original semantic meaning of "incapability".²⁵ It argued that only the "type and technical complexity" of the measure should be taken into consideration, in combination with the "minimum period of time" necessary to implement it. Factors of "economic hardship, adjustment costs and social unrest" were "inevitable" and "should not be included in an objective assessment of whether immediate compliance is impracticable".²⁶ In support of this position Canada argued that only a legalistic approach would avoid a paradox: namely that a grave inconsistency with WTO rules calling for far-reaching changes would lead to a longer time for the member concerned to abolish this measure (should these factors be taken into consideration) than a negligible WTO-inconsistency that called for only minor changes.²⁷ Finally, after citing policy arguments in the Hormones and Bananas arbitration, the EC in the Indonesia case also adopted the US view that only the "content", "legal nature", and "procedure" should be taken into consideration.²⁸

²⁴ WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, see all of them note 11, para.7.

²⁵ For this matter the US cites Webster's Third New International Dictionary (1976), *ibid.*, para.17.

²⁶ WT/DS8/15, WT/DS10/15, WT/DS11/13, para.12.; WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, para.17, see all of them note 11.

²⁷ WT/DS8/15, WT/DS10/15, WT/DS11/13, see all of them note 11, para.26.

²⁸ *Ibid.*, para.13.

(2) The Awards

The cryptic award in the Japan-Taxes case did not refer to the systematic differences of argumentation (clearly reluctant to decide this matter in the very first arbitration pursuant to article 21 para.3 lit.(c)) and decided the matter by referring to the "guideline" of article 21 para.3 lit.(c).²⁹ The award in the EC-Bananas case, however, acknowledged that the "complexity of the implementation process" could be taken into consideration,³⁰ a concept that also inspired the decision in the EC Hormones case.³¹ In consequence, the legal and administrative incapability of implementing measures in a certain time was accepted by the arbitrators as a reason for granting a reasonable time of implementation.³²

Nevertheless, it was not until the Indonesia Automobiles case that the systematic differences and the question of inclusion of other, policy-driven difficulties of implementation were specifically addressed by an arbitrator. After citing the assessment of the arbitrator in the EC Hormones case that the "reasonable period of time, as determined by article 21 para.3 lit.(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB", the arbitrator concluded that "structural adjustment... is not a "particular circumstance" that can be taken into account in determining the reasonable period of time under Article 21.3(c)". The reasonable time frame to implement according to article 21 para.3 lit.(c) was therefore six months. This legalistic approach, however, did not exclude taking into consideration the special circumstances of the case, as Indonesia was finally granted a total of 12 months to implement the measure not because of practical circumstances according to article 21 para.3 lit.(c), but because of Indonesia's nature as a developing country according to article 21 para.2.³³ Lastly, the Australia-Salmon case again reiterated the importance of speedy implementation and decided that a short implementation time of eight months was to be

²⁹ Ibid., para.27.

³⁰ WT/DS27/15, see note 11, para.19.

³¹ WT/DS26/15, WT/DS48/13, see note 11, paras 43-47.

³² As this was not disputed in principle by the parties.

³³ WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, see all of them note 11, paras 22-24.

granted due to the fact that only an administrative measure was needed for implementation.³⁴

(3) *Implementation and Risk Assessment under the SPS-Agreement*

Apart from this general dispute, another issue was debated before the arbitrators in the EC Hormones case and in the Australia-Salmon case. Both cases dealt with conflicts resulting from inconsistencies with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement), and in both cases the member concerned argued for a longer implementation time in order to conduct risk assessments.³⁵ In both proceedings, however, this request was not granted. The arbitrators found that performing a risk assessment was, as a matter of law, an obligation under the SPS-Agreement, and that granting a longer implementation period to “demonstrate the *consistency* of a measure already judged to be *inconsistent*” due to the absence of such a risk assessment “would not be consistent with the provisions of the DSU requiring prompt compliance”.³⁶ Thus, the time needed to conduct risk assessments under the SPS Agreement was “not pertinent to the determination of the reasonable period of time”.³⁷

In consequence, in building on the findings of the EC-Hormones arbitration, the granting of a reasonable period of time to implement the DSB’s findings can only be a “limited right”³⁸ in order to relieve a member of sanctions according to article 22 DSU if it *cannot*, i.e. *is incapable of* implementing the necessary legislation immediately.

The legal weight of these decisions is still meager and it remains to be seen if the following arbitration proceedings can build on these findings.³⁹

³⁴ WT/DS18/9, see note 11.

³⁵ EC-Hormones, WT/DS26/15, WT/DS48/13, paras 5 et seq.; Australia-Salmon, WT/DS18/9.

³⁶ WT/DS26/15, WT/48/13, see note 11, paras 39 and 41 (emphasis in the original).

³⁷ WT/DS18/9, see note 11.

³⁸ See the complainants’ argumentation in the EC Bananas case, WT/DS27/15, see note 11, para.13.

³⁹ The arbitral decision in the Korea-Taxes on Alcoholic Beverages case, is already pending, see the requests for arbitration pursuant to article 21 para.3 lit.(c) by the US, WT/DS75/13, WT/DS84/11 (15 April 1999) and by the EC, WT/DS75/14, WT/DS84/12 (15 April 1999).

III. The System of “Trade Sanctions” – Compensation and Suspension of Concessions

The aforementioned provisions of the DSU deal with the complex mechanism of implementation of the DSB’s recommendations and rulings up to the stage of determining a reasonable period of time for compliance.

However, the most far-reaching provision of the DSU comes into play in cases where this complex implementation procedure fails: pursuant to article 22 para.6 DSU the DSB, “upon request, shall grant authorization to suspend concessions or other obligations ...”. This suspension of concession is often referred to as “trade sanction” or “retaliation”. However, it has to be noted that those rather general terms cannot give any detail as to the rather peculiar and explicitly drafted concepts of article 22.

1. Lessons from History: The GATT System

The need for such measures is apparent and generally not new in the system of GATT-law: In case a member fails to comply, i.e. fails to bring its measures into conformity with the WTO provisions, a powerful tool is needed to act as a “stimulant” for immediate compliance, or, as the arbitrators in the recent Banana dispute put it, to “induce” compliance.⁴⁰ Under the old GATT system Article XXIII: 2 allowed for the authorization to suspend concessions or other obligations against another member. Due to shortcomings in the old GATT system, however, this tool proved not very effective.⁴¹ The old GATT not only left it to the discretion of the Contracting Parties whether or not to authorize retaliatory action, but more importantly the members could veto the final decision.⁴² Consequently, in several disputes in which retaliatory action had been thought appropriate by the panel, the member concerned blocked the adoption of this decision by the Contracting

⁴⁰ EC-Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the EC under article 22 para.6 of the DSU -, WT/DS27/ARB (9 April 1999), para.6.3.

⁴¹ See e.g. Hudec, Davey, see note 1.

⁴² The old GATT system operated under positive consensus, thus allowing for an easy way of blockage, see Davey, see note 1, 94.

Parties.⁴³ Also, the use of countermeasures was limited to the one agreement at hand, so that interestingly, in the only case in which retaliatory action was ever granted under the old GATT system, the scope of retaliatory action granted was not used, as this would have hurt the “retaliator’s” economy more than that of the offender due to its dependency on the goods concerned.⁴⁴

2. Compensation and Suspension of Concessions under the WTO

The completion of the Uruguay rounds has brought forth a more potent system of countermeasures to accompany the general strengthening of the dispute settlement procedure. In short, it combines a clear-cut right for States to take action and a broadened range of possible targets with strict and explicit disciplines.

a. Voluntary Compensation as an additional Element of mutually acceptable Solution

In view of the general principle of the DSU to foster amicable and mutually acceptable solutions, article 22 DSU now provides for a new way of procedure: Aside from the suspension of concessions (or other obligations) as authorized by the DSB, parties to the dispute might opt for voluntary compensation.⁴⁵ Under article 22 para.2, a member under a duty to implement, upon request, shall enter into negotiations with any

⁴³ EC-US: Income Tax Legislations [DISC], authorization requested by EC, C/W/384 (29 April 1982) and C/W/392 (21 July 1982), blocked by US, C/M/157,159,160 (7 May, 29/30 June and 21 July 1982); Mexico, Canada, EC-US: Taxes on Petroleum and Certain Imported Substances [“Superfund” Taxes], authorization requested in C/W/608 (29 September 1989), blocked by US, C/M/236,237 (11 October and 7 November 1989); US-EC: Payments and Subsidies on Oilseeds and Animal-Feed Proteins, authorization requested by US, but blocked by EC, C/M/260 (4/5 November 1992).

⁴⁴ US: Import Restrictions on Dairy Products, GATT Doc., BISD 1S/32, 1953 (8 November 1952) and Netherlands Action under Article XXIII:2 to Suspend Obligations to the US, GATT Doc., BISD 1S/62, 1953 (8 November 1952).

⁴⁵ Voluntary compensation as such is not new in GATT law and was already an option for the parties to settle the dispute. However, the DSU has introduced a formal procedure of negotiations in this regard.

party having invoked the dispute settlement no later than at the expiry of the reasonable period of time, in order to achieve such mutually acceptable solution. However, should the negotiations prove fruitless within 20 days of the adoption of the final decision by the DSB, the victorious party may seek an authorization by the DSB for suspension of concessions or other obligations under covered agreements to the dispute. Clearly, the granting of voluntary compensation is the less bellicose alternative and recent practice has shown that this alternative can also be used as a concession to compensate for a longer implementation period.⁴⁶

b. A Right to Implementation and to Retaliation

However, the most striking new element of the new DSU certainly is the automatic adoption of requests for authorization of retaliatory measures. According to article 22 para.6 the DSB "shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time", unless it rejects such a request by consensus or suspension is prohibited by the covered agreement (article 22 para.5). Thus, the DSB is under an obligation to authorize suspension of concessions. The GATT CONTRACTING PARTIES' discretion as to whether retaliatory measures are to be authorized is thereby substituted for a more formal function of the DSB, left only with the power to reject the retaliatory measure altogether by a consensus decision - an unlikely occurrence, as the member seeking authorization will not turn it down in the DSB. In essence, the negative consensus rule gives members a "right to implementation" and, in case of non-implementation, a "right to retaliation".

c. A Broader Scope for Suspension of Concession

Additionally, the DSU has considerably broadened the scope of potential targets for a suspension. In line with the GATT concept, article 22 para.3 lit.(a) directs the complaining party first to seek to suspend concessions or obligations in the "same sector(s)" as the infringing measure. However, should a party consider that such suspension is not

⁴⁶ In the Japan-Taxes on Alcoholic Beverages case Japan granted tax concessions in exchange for a longer implementation period, WT/DS8/17, WT/DS10/17, WT/DS11/15 (30 July 1997). However, this case was finally settled by arbitration, see note 11.

practical or effective, it may seek suspension of concessions in other sectors under the same agreement (article 22 para.3 lit.(b)) or even of another covered agreement (so-called “cross-retaliation”) (lit.(c)). Article 22 para.3 lit.(d) and (e) contain some additional and procedural requirements in this regard. Under article 22 para.3 lit.(d), a complaining party has to take into account the trade and the broader economic elements involved. Under article 22 para.3 lit.(e) the member, in its request, has to give reasons for the choices made and additionally has to forward its request to the Councils and relevant bodies of the WTO.

The possibility of “cross-retaliation” according to article 22 para.3 lit.(c) gives retaliating members the opportunity to effectively direct their countermeasures at areas of trade more vital to the economy of the wrongdoer. The inclusion of this measure can be seen as a direct result of the practice of “economic warfare” during the last decades: States have learned that they can strike at others best in markets they control, not necessarily in the market they want to open. The US practice during the 1980s in coercing (mostly developing states) into opening markets to US products, or into securing intellectual property rights not covered under the old GATT system by stopping imports in other sectors according to Sect. 301 of the 1974 Trade Act, proved a clearly GATT-violatory,⁴⁷ but highly effective⁴⁸ practice. In comparison to the single case of ineffective authorization of suspension of concessions under the old GATT system, had the member (Netherlands) been able to close other, more vital markets to secure adherence to WTO rules, this might have enhanced the retaliation’s effectiveness.⁴⁹

However, the practical difficulties of retaliatory measures should not be underestimated. When “coercing” an unwilling member into compliance with suspension of concessions, which might call for 100 per cent *ad valorem* duties on imports or denial of exports, it is not only the member concerned that must bear the weight of these measures. In a more interwoven world economy a trade war between major economic players will hurt the economies of both combatants – that of the

⁴⁷ See e.g. Hudec, *Enforcing International Trade Law*, see note 1; J. Bhagwati, *The World Trading System at Risk*, 1991, 48 et seq.

⁴⁸ A number of disputes were settled under the threat of “retaliatory” US action under Section 301, e.g. Taiwanese Restrictions on Beer and Wine (301-57), 51 US Federal Register 44958, 1986.

⁴⁹ In the Netherlands case, the Netherlands were finally authorized to limit the import of wheat flour to 60.000 tons. However, the Netherlands were dependent on imports of wheat flour from the US.

“retaliator” as much as that of the purported “offender”. This will be even more so when applying cross-sectoral countermeasures, which will tend to inflict damage on national industries not at all affected by the trade policy deemed to be WTO-inconsistent. Pressure not to introduce retaliatory duties will thus be applied by both the international and domestic industry.⁵⁰ Therefore, as much as “compliance or retaliation” is legally an alternative, recourse to suspension of concessions can only be seen as the last and temporary means to settle a conflict.⁵¹

d. The Disciplines. Clarifying Objectives and Limits of Countermeasures

The strengthening of rights of members to take effective action in order to induce compliance is balanced by adding explicit disciplines, which clarify and safeguard the objectives and limits of “trade sanctions”. First and foremost, article 22 para.1 voices a preference for full implementation and conformity with the covered agreements. This provision underlines that the objective of article 22 is the enforcement of the existing legal obligations based on agreements and concessions in the light of the rulings and recommendations of the DSB.⁵² The provision especially aims at preventing a situation of a sort of *de facto* amendment of obligations between parties, in which the inconsistent measure and the retaliatory action are upheld in disregard of the procedures provided for in the WTO agreements. The last phrase of article 22 clearly points to this aspect in regard to voluntary compensations. In the same sense, article 22 para.8 stipulates that suspensions shall be temporary. Procedurally, under article 22 para.5 the DSB shall not authorize suspensions prohibited by covered agreements. Also, the continued supervision of the DSB as called for by article 22 para.8 shall safeguard this principle.

According to article 22 para.4, the other important principle is that of equivalence. This principle stipulates that the level of suspension shall be “equivalent” to the level of nullification or impairment,⁵¹ thus

⁵⁰ See the complaints by Mattel Inc., Agfa and the Cheese Importers Association of America against the proposed 100 per cent retaliatory tariff that would cause price raises on products relying on EU-imports, *International Trade Reporter*, BNA ITR Vol.15, No.49, 16 December 1998, 2092 et seq., (2093).

⁵¹ Article 3 para.7 therefore speaks of the suspension of concessions as “last resort”.

⁵² See also article 3 para.7.

foreclosing any punitive effect.⁵³ Article 22 para.8 safeguards this principle *ratione temporis* by stating that suspensions shall only be applied until the measure found to be inconsistent has been removed, or the dispute is settled otherwise. The procedural means to safeguard this principle of equivalence is provided for by an arbitration proceeding pursuant to article 22 para.6.

3. Scrutinizing the Level of Sanctions by Arbitration — Article 22 para.6 and the Banana Dispute

According to article 22 para.6 the member concerned may object to the level of suspension or to deficiencies in procedure, thus referring the matter to another round of arbitration that is preferably to be carried out by the original panel⁵⁴ and shall be completed within 60 days of the expiry of the reasonable period of time (arts 22 paras.6 and 7). Article 22 para.6 DSU clarifies that during the course of the arbitration no suspensions may be carried out. The EC in the Banana controversy initiated such arbitration in addition to requesting a panel under article 21 para.5.⁵⁵ The proceedings gave rise to a number of difficult legal issues.

First, a ruling of the protection of secret business information was made by the arbitrator, but later on turned out not to be crucial, as the arbitrators could rely on other data.⁵⁶ Also, a request by Ecuador raised the issue of the status of third parties. However, the arbitrators declined such request by considering Ecuador's rights not to be affected, thus abstaining from more general statements in this regard.⁵⁷ However, the main issue at stake was the scope of review in an arbitration under article 22 para.6.

a. Subject and Scope of Review under Article 22 para.6

Article 22 para.6 envisages two different, but often closely linked subjects for arbitration. First, an objection of the member concerned as to

⁵³ See WT/DS27/ARB, para.6.3: "there is nothing in the DSU that could be read as a justification for countermeasures of a punitive effect".

⁵⁴ Or by an arbitrator appointed by the Director-General.

⁵⁵ Request for Arbitration under article 22 para.6 DSU, WT/DS27/46 (3 February 1999).

⁵⁶ WT/DS27/ARB, paras 2.1-2.7.

⁵⁷ *Ibid.*, para.2.8.

the level of the suspension proposed may be referred to such arbitration. This clearly points to the general principle of equivalence and especially to article 22 para.4. On the other hand, an arbitration may also be initiated to deal with claims that the specific principles and procedures as set out by article 22 have not been followed.

Article 22 para.7 carefully specifies the scope of review in those two cases. It excludes any examination of the nature of the concession or other obligations to be suspended. However, it includes determinations of whether the suspension of such concessions or other obligations is consistent with the covered agreements.

b. Full and Substantial Review of Equivalence

Article 22 para.4 stipulates that the level of suspension of concessions or other obligations shall be "equivalent" to the nullification or impairment suffered by the claiming member, and that this equivalence shall be determined by the arbitration. Under the GATT 47 the test as to the level of countermeasures had been one of "appropriateness", defined by the working party as a combination of "appropriate in character" and "reasonableness".⁵⁸ In comparison to this test under the old GATT system, the new WTO notion of "equivalence" seems to envisage a closer relationship between nullification and countermeasure. The original meaning of the word equivalence being "of equal value", it seems to call not only for an appropriate relationship, but for an exact balance between the value of impairment and the value of the countermeasure. In securing real equivalence or balance, both sides of a "virtual scale" must be weighed against each other, and thus both sides must be exactly calculated. As to the interrelation of these two variables, the level of suspension must depend on the level of nullification or impairment felt by the claiming member at the time of the request.

Indeed, the arbitrators in the Banana case held that the determination of equivalence required an assessment of the impairment or nullification of benefits suffered by the United States as the originally complainant party, a determination that both parties to the arbitration accepted in this generality.⁵⁹ Furthermore, the arbitrators without objection assumed that this nullification or impairment depended on the extent of inconsistency of the measures at stake, e.g. the EC banana mar-

⁵⁸ Report of the working party on Netherlands Action under Article XXIII:2 to suspend Obligations to the US, see note 44.

⁵⁹ WT/DS27/ARB, para.4.2.

ket rules.⁶⁰ To the more, now meeting some concerns from the EC, the arbitrators based their examination on the actual state of affairs, thus looking into the WTO consistency of the new and revised regime, rather than focusing on the previous regulation as dealt with by the Panel and the Appellate Body. This approach has serious implications as to the position of the arbitrators, yet, as the arbitrators rightfully found, "any assessment as to the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO-rules of the implementation measure" taken by the member concerned.⁶¹

Thus, the arbitrators undertook a full review of the WTO consistency of the revised EC banana import regime. As they concluded that there were still WTO-inconsistencies under this revised regime, and thus a continuation of nullification or impairment of US benefits, they entered into a calculation of the level of nullification or impairment. They concluded this calculation in determining that the level of nullification and impairment suffered by the United States amounted to US\$ 191.4 million per year and finally found that the suspension of concessions and related obligations under GATT 1994 covering trade in such maximum amount would be consistent with article 22 para.4 DSU.⁶²

c. Doubts in View of the Appropriateness of an Arbitration Procedure

Having regard to the structure and concept of the DSU in general, this arbitration might very well stay an extraordinary event. Indeed, it seems quite doubtful whether an arbitral body, as instigated by the DSU seemingly in a purely procedural context, is the appropriate institution to make determinations concerning the consistency of implementation measures undertaken by members. The procedural disciplines of an arbitration are certainly less developed than those for panels and the Appellate Body. The EC in this regard especially pointed to the status of third parties and the burden of proof.⁶³ Furthermore, the interrelationship to panel procedures under article 21 para.5 merits attention. In consequence, the question arises whether the WTO-consistency or inconsistency of the implemented measure can be determined in an arbitration procedure pursuant to article 22 para.6.

⁶⁰ Ibid., para.4.5.

⁶¹ Ibid., para.4.3.

⁶² Ibid., para.8.1.

⁶³ Ibid., para.4.12 and 4.13.

As already said, the arbitrators in the Banana case found that they could make a determination as to the overall WTO-consistency of the implementation measures. In fact, following their understanding of "equivalence", it was necessary to establish the level of nullification or impairment suffered by the US in order to determine the level of suspension of concessions.

The arbitrators based this conclusion on three arguments: First, on the wording of article 23 para.2 lit.(a), which expressly included findings of WTO-inconsistency by an "arbitration award", second on the strict time-frame of article 22 para.6, which necessitated a speedy evaluation of the implementation measures, and lastly on the (certainly not indecisive) fact that the three individuals acting as the arbitrators in the article 22 para.6 procedure were, in fact, the same individuals acting as Panelists in Ecuador's and the EC's article 21 para.5 proceedings.⁶⁴ Apart from the interesting fact of personal identity of the Panel and the arbitrators, the two arguments sound convincing – at least at first sight. Article 23 para.2 lit.(a) does include reference to arbitration awards. However, this article could also be understood as a general reference as to the monopoly of the DSU to make determinations concerning *any* issues touching international trade under the WTO system. Article 23 para.2 lit.(a) in this respect could be seen as a mere enumeration of the mechanisms of the DSU that can be utilized to secure multilateralism, and not as a norm granting competence to specific bodies of the DSU.⁶⁵ The shortened time span of 60 days inherent in article 22 para.6, on the other hand, seems to convincingly exclude other parallel (or prior) procedures regarding the WTO-consistency of the implementation measure. However, if this were the only argument in respect to the arbitrators' usurpation of power to determine the WTO-consistency of the implementation measure, this reasoning seems – at least – questionable in light of the overall "constitutional" problems concerning proper implementation. In sum, subsequent procedures⁶⁶, as well as the ongoing discussion on the relationship between article 22 para.6 and article 21

⁶⁴ Ibid., paras 4.3, 4.8, 4.11, 4.6, 4.9 and 4.15.

⁶⁵ For a general analysis of article 23 DSU see C. Schede, "The Strengthening of the Multilateral System", *W.Comp.* 20 (1996/97), 109 et seq.

⁶⁶ The next highly disputed dispute between the EC and the US Measures Concerning Meat and Meat Products (Hormones), WT/DS26 and WT/48 is coming to a climax with the US announcing to seek authorization for suspension of concessions by the DSB, see *Frankfurter Allgemeine Zeitung*, 15 May 1999, p.1. See also *International Trade Reporter*, BNA ITR Vol.16, No.18, 5 May 1999, 779 et seq.

para.5 will show if this excessive interpretation concerning the powers vested into the arbitration pursuant to article 22 para.6 will be followed.

IV. Proper Implementation in Dispute – Article 21 para.5 DSU

International trade disputes and related rulings and recommendations often involve complex legal issues. Also, they not only have international, but also – and some may say primarily – national policy implications.⁶⁷ States under a duty to implement have to cope with the legal complexity and often meet with economic difficulties and internal opposition, often tempting them to tailor implementation measures as narrowly as possible. As has been shown, those aspects have been considered in view of a reasonable period of time to be granted for implementation under article 21 para.3.⁶⁸ They also make it likely that different points of view emerge as to proper implementation among parties to the dispute. To some extent, the continued surveillance of the DSB, as called for by arts 21 para.3 and 21 para.6. DSU, may provide for transparency, allow for early review and discussion of the implementation measures, and thus may prevent conflicts. Such surveillance includes an obligation of the member concerned to inform and report on intentions and status regarding implementation⁶⁹ and a right of any member to raise related issues at the DSB at any time.⁷⁰

In addition to those means, the DSU in article 21 para.5 provides for a specific procedure to resolve controversies regarding proper implementation. With regard to a “disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings”, article 21 para.5 states that “such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.”

⁶⁷ P.T. Stoll, “Freihandel und Verfassung, Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung (GATT/WTO)”, *ZaöRV* 57 (1997), 83 et seq., (111 et seq.)

⁶⁸ See Part II.

⁶⁹ Arts 21 para.3 and 21 para.6 DSU, see Part II.

⁷⁰ See the statement by the original claimants in the DSB meeting of 22 September 1998 “about the EC’s failure to comply with the DSB’s recommendations” concerning Reg. (EC) No.1637/98, referred to in WT/DS27/40 (15 December 1998).

The provision gives some more details as to the time frame and composition of the panel, but otherwise contains little guidance.

The article 21 para.5 procedure has been an issue in discussions regarding implementation in the Banana case. In an attempt to react to criticism by the original complaining parties and alleged preparations to resort to sanctions by the United States, the EC requested the establishment of a panel under article 21 para.5 on 14 December 1998.⁷¹ Four days later, Ecuador – a complaining party to the panel and appellate body proceedings – made a similar request.⁷² Subsequently, as has been mentioned above, the EC requested an arbitration according to article 22 para.6.⁷³ Indeed, these multiple proceedings offered a formidable challenge and opportunity to explore the nature of article 21 para.5 proceedings and their interrelationship with the article 22 para.6 arbitration.

The Ecuadorian request, albeit provoking a number of important but detailed procedural questions was otherwise in line with what can be considered the very purpose and aim of article 21 para.5.

In comparison, the EC request under article 21 para.5 was a rather peculiar one. Firstly, the EC invoked article 21 para.5 as an original respondent to the dispute. Moreover, the relief sought by the EC was special, as the EC requested the panel to find that the EC's implementation measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures."⁷⁴

1. The Right to invoke Article 21 para.5: A Respondent-Driven Procedure?

The question whether the original responding party is entitled to invoke article 21 para.5 is a difficult one due to its far reaching implications and was explicitly left unanswered by the panel.

Article 21 para.5 DSU is drafted in a special way, quite apart from the notion of a "complaint" as provided for in other parts of the DSU.

⁷¹ WT/DS/27/40 (15 December 1998).

⁷² WT/DS27/41 (18 December 1998).

⁷³ WT/DS27/46 (3 February 1999).

⁷⁴ WT/DS27/RW/EEC, para.4.13. See also para.2.22 and for the terms of reference of the panel: paras 1.5, 4.1 - 4.3.

Under Article XXIII GATT 1994 and GATS, panel procedures require that a party put forward a claim considering benefits accruing to it being nullified or impaired. In contrast, article 21 para.5, in a rather neutral and objective way, relies on a "disagreement". Given the fact that implementation issues can be raised by any member in the DSB, this wording, taken as such, could theoretically even cover action by any member.⁷⁵ While certainly the dispute settlement system contains many features which clearly head for the enforcement of the WTO in the common interest of all members, the procedures as such are designed in a more restrictive way, requiring at least some substantial interest for participation. However, article 21 para.5 is certainly worded wide enough to include the case of an originally responding party invoking it.

India and Japan in their submissions as third parties to the panel proceedings have indicated a number of good reasons why indeed article 21 para.5 should cover actions by responding parties.⁷⁶ First, it seems to be unsatisfactory that a party that has taken efforts to implement has no means to justify its measures if criticism is voiced by a other member. Furthermore, a complaining party can go ahead with measures under article 22 without having to consider implementing measures already carried out. In the end, this would mean that the complaining party has a right on its own to determine whether implementation has been carried out properly without any multilateral review of those findings.

However, accepting initiatives by originally responding parties has a number of important implications, as partly witnessed by the EC article 21 para.5 panel. The originally complaining parties abstained from participating in the panel, only partly because they found the EC request impermissible in substance. More importantly, they felt that "there is no provision in the DSU for a Member to compel other countries to come forward to serve as complaining parties against its measures at a time determined by that member ..." and furthermore considered that "any conclusion regarding the conformity of the EC measures cannot bind a non-party to the process, despite the EC's attempts to achieve this purpose".⁷⁷ Thus, only one party - the EC - and a number of third parties took part in the proceedings.

⁷⁵ Submission by the EC, WT/DS/27/RW/EEC, para.2.12.

⁷⁶ WT/DS27/RW/EEC, paras 3.1-3.8 (India) and paras 3.10-3.14 (Japan).

⁷⁷ Extracts from a letter of Guatemala, Honduras and the United States to the Panel of 19 January 1999, WT/DS27/RW/EEC, para.2.6.

Indeed, the question whether responding parties may invoke article 21 para.5 provokes the further question, how the originally complaining parties can be persuaded to take part in the proceedings. From their point of view, they are justified in proceeding and requesting authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements under article 22 para.2 without having to take into account that implementation measures have been taken. It therefore seems necessary to either require them to participate in a proceeding under article 21 para.5, or to mandate recourse to such a proceeding prior to the initiation of article 22 measures.⁷⁸ It is only under those conditions that a respondent-driven article 21 para.5 procedure will make sense. Other options, which could include furnishing findings and conclusions of a one - party - article 21 para.5 - panel with some binding legal effect upon absent originally complaining parties⁷⁹, or allowing a responding party to request a normal panel to counter actions of complaining parties, are beyond the letter and spirit of the DSU. The three panelists, owing to the fact that they acted as panelists in this case as well as arbitrators in the article 22 para.6 arbitration, found a rather pragmatic solution to this dilemma. As explained earlier, they extensively interpreted their arbitral mandate under article 22 para.6 in a way to include a full substantive review of implementation measures. Thus, article 22 para.6 will cover a broad range of cases which otherwise would - or supposedly should - fall in the realm of article 21 para.5. It has been doubted whether dealing with such questions in an arbitral procedure is appropriate. Indeed, arbitration pursuant to arts 21 to 23 DSU seems to be a process primarily envisaged to resolve purely procedural matters, such as implementation periods, level of suspension of concessions or adherence to special procedures. However, the panelists in their arbitral report pointed to article 23 para.2 lit.(a), which envisages that arbitral awards have the same legal validity as panel reports.⁸⁰

⁷⁸ Argument by India in favour of the EC position, WT/DS27/RW/EEC, para.3.4.

⁷⁹ Suggested by Japan, WT/DS27/RW/EEC, para.3.14.

⁸⁰ See the discussion of the article 22 para.6 procedure under Part III .

2. Procedural Steps and Objectives of the Article 21 para.5 Procedure

Aside from the question of a right to initiate proceedings under article 21 para.5, a number of other procedural matters were raised in the two panels, relating to consultations, an appeal, the granting of another period of time for implementation and the proper subject of proceedings. Those aspects all point to the rather poor procedural guidance given by article 21 para.5, which merely states that “such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel...”, while on the other hand imposing a rather strict and short time frame: “The panel shall circulate its report within 90 days after the date of referral of the matter to it.”⁸¹

a. Consultations required prior to requesting an Article 21 para.5 Panel?

This short time frame, cutting down normal panel procedures amounting to an overall period of nine months under article 20 to 90 days (article 21 para.5), would seem to exclude recourse to a full new cycle including consultations according to article 4 para.7, as this would add a maximum of 60 days to what was supposed to be a specifically shortened procedure.

On the other hand, the wording of article 21 para.5, referring to “these dispute settlement procedures, including ... resort to the ... panel”, can hardly be understood to exclude other stages of procedure. In particular, as the dispute settlement mechanism gives priority to negotiated solutions to conflicts, and as such emphasizes the need for consultations in all stages of the proceedings, the exclusion of such consultations in the last stages of implementation would seem inappropriate. Indeed, requests for consultations have actually been made in article 21 para.5 procedures, furnished, however, with an express disclaimer, whereby the States reserved all rights in this question.⁸² In the article 21

⁸¹ It should be noted though, that article 21 para.5 provides for some possibility for the Panel to extend the time frame on notice to the DSB.

⁸² On 18 August 1998 Ecuador, Guatemala, Honduras, Mexico and the US requested consultations with the EC in the ongoing Banana-dispute, stating that “this request is without prejudice to our right to request review under Article 21.5 procedures...”, WT/DS27/18 (31 August 1998).

para.5 panel initiated by Ecuador, it was held by the original complainants that consultations were not required under article 21 para.5. This view was contested by the EC in pointing to article 21 para.5 and the phrase “these dispute settlement procedures”, which would include consultations under article 4 para.7. As consultations took place notwithstanding those views, the panel did not need to decide on the issue.⁸³ In the panel requested by the EC, three originally complaining parties in their letter explaining their position to remain outside the proceedings voiced concerns with regard to a lack of consultations concerning the claims made by the EC. However, the panel did not address these arguments, because the three members did not become parties to the dispute.⁸⁴

b. Appellate Review and a new reasonable Period of Time?

The more lingering question relates to the admissibility of an appellate review, and even more so, to another grant of a reasonable period of time under article 21 para.3 - all elements of “dispute settlement procedures” as referred to by article 21 para.5.

The question of the possibility of an appellate review of the Panel’s findings is not answered by the wording of article 21 para.5 and was disputed in the recent Banana case. In view of ensuring due process the right of an appeal serves the legitimacy of the process,⁸⁵ however, this would call for another lengthy procedure until the conformity of the measures was finally established. Again taking advantage of serving in all three procedures in identical composition, the three panelists briefly referred to this point in their article 22 para.6 arbitral award in stating that it is up to the Appellate Body to decide, “whether [it] will accept jurisdiction of an appeal in an Article 21.5 proceeding.”⁸⁶

As the article 21 para.5 proceeding is to be seen as a speedy procedure – this much can be assumed in light of the short time frame – a granting of a new reasonable period of time (including the possibility of an arbitral proceeding under article 21 para.3 lit.(c)) cannot be deemed inherent in article 21 para.5. Indeed, the EC as the defendant in Ecuador’s recent article 21 para.5 proceeding in the Banana dispute even ac-

⁸³ WT/DS27/RW/ECU, para.3.1.

⁸⁴ WT/DS27/RW/EEC, para.4.12.

⁸⁵ Argument by India as a Third Party in favour of the possibility of appellate review, WT/DS27/RW/EEC, para.3.6.

⁸⁶ WT/DS27/ARB, para.9.1.

knowledge that it did not expect a new implementation period to be granted by the Panel.⁸⁷

c. Article 21 para.5: Proper Subject and Applicable Law

Another point at issue is the subject of the procedure under article 21 para.5. It clearly must be the implementation measure at hand, quite distinct from the original measure in dispute.⁸⁸ This measure has to be examined in a twofold way. First, its compliance with the rulings and recommendations of the DSB has to be ascertained. The defending party is generally obliged to bring the disputed measure or related policy into conformity with those specific Articles of the Agreements which were cited by the complaining party and, subsequently, the breach of which was confirmed in the panel or appellate body procedure. However, in referring to "consistency with a covered agreement", article 21 para.5 DSU, furthermore, requires that it be examined whether the implementation measure conforms to other provisions of the WTO legal order as well. This reading of article 21 para.5 DSU was disputed by the EC in Ecuador's article 21 para.5 proceeding during the most recent round of the Banana dispute. The EC argued that no new claims were to be submitted by Ecuador and that only the "matter" discussed by the original panel and Appellate Body reports was to be subject to the test of WTO-conformity by the panel under article 21 para.5. This was due to the dually shortened time period granted to the member concerned under article 21 para.5: firstly, to counter new arguments of the claimant and secondly, to finally adopt measures needed without another reasonable period of time.⁸⁹ However, the panel refuted the EC's arguments stating that otherwise two procedures would be necessary – one procedure to ascertain whether the offending measures had been removed, and another procedure to consider the overall WTO-consistency of the new measures. The panel in the Banana dispute thus acknowledged that in light of the need for prompt dispute settlement a panel under article 21 para.5 DSU had the right to examine the new measure's full WTO-consistency.⁹⁰

⁸⁷ WT/DS27/RW/ECU, para.6.3.

⁸⁸ WT/DS27/ARB, para.7; WT/DS27/RW/ECU, paras 2.1 and 6.7.

⁸⁹ WT/DS27/RW/ECU, para.6.3.

⁹⁰ WT/DS27/RW/ECU paras.6.9 and 6.12.

The panel under article 21 para.5 will be bound by the rulings and recommendations but is free to examine new aspects of the implementation measure, including new concerns in view of WTO provisions.

d. Proper Purpose-Interim Procedure or Resumed Panel Proceedings

In sum, the procedural issues discussed can only be properly answered on the basis of a more general outline of the objectives and the purpose of article 21 para.5 in the light of the three Banana proceedings. From first reading, article 21 para.5 suggests itself as a speedy interim procedure to settle disagreements as to proper implementation in the wake of enforcement measures. If seen in this perspective, the short time frame plays an important role, and thus there is good reason to assume that consultations and an appellate review are misplaced in this regard. In this perspective, however, the interrelationship with article 22 is critical, especially as article 21 para.5 - unlike article 22 para.6 - does not explicitly call for a suspension of measures under article 22. As stated above, however, the extensive use that the three panelists have made of their mandate as arbitrators under article 22 para.6 will cover most situations in this regard. If their approach is followed in other arbitration proceedings in the future there will be little room left for article 21 para.5 in this respect.

Another way to look upon article 21 para.5 would be to consider it a special way to reconsider or to resume the original dispute on the basis of the implementation measure. Article 21 para.5 could thus be considered to address situations in which trade conflicts have not been settled by panel or appellate body proceedings and urgently require speedy response under the multilateral system as to proper implementation. Article 21 para.5 in this perspective can be considered a shortcut panel procedure, which, while ensuring effective work, provides for a shortened time span for panel proceedings, whereby the identical composition of the panel, as called for by article 21 para.5, secures familiarity with the matter at hand and a continuity of views. In this case, consultations and an appellate review seem right in place. In this regard, one could even consider the automatic participation of all original parties to the dispute by arguing that article 21 para.5 serves as a means to resume initial panel proceedings in the light of implementation measures in order to address what has proven to be a serious and pertinent conflict.

V. Conclusion

The new round of Banana controversies has caused some turbulence in the dispute settlement system. The EC article 21 para.5 request - though being quite outside the range of that procedural tool - has raised a number of important issues which will need to be addressed in the future. The enforcement part of the dispute settlement system, it appears, is not yet completely ready to meet the needs of a strictly rule-oriented trade dispute settlement mechanism. Inviting further delays at the implementation level is as unsatisfactory as is invoking measures under article 22 without any regard to a responding party's endeavour to comply with its obligations. In this respect it should be noted that the DSU seems to be even less explicit as to how to handle cases in which a responding party claims that measures under article 22 should cease, as the measure found to be inconsistent with a covered agreement has been removed.

The three individuals in the three proceedings have managed to abstain from dealing with those general or even "constitutional" questions, the identical composition of the panels and of the arbitration enabling a practical handling of the complex matter.⁹¹ This is in line with the specific objectives and purposes of dispute settlement in the WTO framework, which is a rather limited one. The dispute settlement system is not yet considered a court-like institution within the WTO framework, but rather is seen as a limited mechanism which is not mandated to issue expertise or engage in judicial activism. As preparations for the DSU review are already under way and a new WTO round will probably take place in the foreseeable future, there is ample opportunity for members to deal with those questions at a political level, which seems appropriate in view of the importance of these questions for the overall effectiveness of dispute settlement.

It can be expected that members will succeed in addressing some of the shortcomings of the DSU text. However, any such solution has constraints which are inherent in the very concept of enforcement and compensation in the WTO dispute settlement system. The proceedings and issues outlined above in sum point to the more general question of reconciling the interest of speedy law enforcement on the one hand, and

⁹¹ The panelists referred to the task of "finding a logical way forward", with which they were entrusted by the Chairman of the DSB, WT/DS27/RW/EEC, para.4.16; WT/DS27/ARB, para.4.9.

justice on the other. This is a general legal concern and a number of concepts have been developed in this regard.

The law in general in many instances allows for the enforcement of monetary claims in parallel to the procedure dealing with the claim in substance, often combined with some requirement to make a security deposit prior to taking enforcement action. Also, interest payments for arrears are often due. The WTO law enforcement system, on the other hand, merely provides for compensation of future trade losses.⁹² It neither allows for compensation of past losses, nor for interest. Furthermore, it is confined to reciprocal cuts to trade opportunities, although the appropriateness of such measures is determined in monetary figures. A system providing for monetary damages for past unlawful acts and for interest, as is in place in many other areas of international and national law, is able to reconcile the conflicting interests of speedy enforcement and material justice more easily. Of course, this point is made in order to explain the source of the problem, rather than to suggest that such approach should be adopted by the WTO. Nevertheless, when looking at the WTO enforcement system's peculiar structure and its effectiveness from a more distant perspective, such proposed monetary sanctions would look much more familiar to a lawyer than putting the blame and consequences for the EC's failure to fix its banana import regime on French producers and even American importers of, for example, women's luxury handbags.⁹³

⁹² Building on the GATT system, see e.g. the Trondheim Panel Report, GATT Doc., BISD 39S/4000,1990.

⁹³ See the final list of EU Imports to suffer retaliatory duties published by the US, published in the *International Trade Reporter*, BNA ITR Vol.16, No.15, 14 April 1999, 621 et seq.